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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TAYS EAGLET SALAZAR,

Defendant and Appellant.

A149513

(Humboldt County
Super. Ct. No. CR1600798)

After a jury trial, appellant Tays Eaglet Salazar (Salazar) was found guilty of second degree robbery based on the February 2016 robbery of a store clerk. Salazar does not challenge his conviction on appeal. Rather, he contends only that the trial court erred at sentencing in failing to consider numerous mitigating factors before imposing the upper term of five years for his crime. We conclude Salazar has forfeited his claim of error by failing to object on this basis in the trial court. We additionally reject Salazar's related ineffective assistance of counsel claim and therefore affirm.

I. BACKGROUND

On February 13, 2016, Amanda Lawson visited the Orick Market on several different occasions, buying things and chatting with Philip Coombs, the store clerk. She even went outside with Coombs several times to have a cigarette. Coombs considered Lawson a friend. On her third or fourth visit to the store, Lawson moved around in an "odd" fashion and stood at the end of the counter—leaning over it and talking—which

was an unusual place for a customer to stand. She and Coombs discussed what type of security system the store had. Coombs pointed out that the store had gotten some new surveillance cameras. However, because there was something “off” about the questions she was asking, which made him nervous, Coombs lied to Lawson, telling her the cash registers had panic buttons inside their cash drawers.

Later that evening, a man entered the store wearing a hood with a face covering. Based on his voice and the portion of his face that was visible around his eyes, Coombs was able to recognize Salazar, a friend of Lawson’s with whom he had interacted eight to ten times in the days leading up to the robbery. According to Coombs, Salazar had been hit in the face with a branch of poison oak or sumac and so his face was unusually red and puffy.

Below the cash register, there was a bundle of cash, credit slips, and miscellaneous receipts from the previous day that had not yet been deposited. In Coombs’ opinion, Lawson would “clearly” have been able to see the package when she stood at the end of the counter earlier in the day. After asking for a pack of cigarettes and a bag, Salazar instructed Coombs to hand him the cash deposit, but not to touch the cash drawer. Coombs believed Lawson must have told Salazar about the fictitious panic button. During this interaction, Salazar kept his left hand in his pocket and pointed at Coombs, which led Coombs to believe that he was armed. Fearing for his safety, Coombs gave Salazar the cash bundle valued at \$1,464.09, after which Salazar exited the store. Later, Coombs picked Salazar out of a photo lineup, stating he was “100 percent sure” Salazar was the perpetrator.¹

As a result of this incident, on April 25, 2016, the Humboldt County District Attorney filed an information charging Salazar with one count of second degree robbery, a violent felony. (Penal Code, §§ 211, 667.5, subd. (c)(9).) The information further alleged one prior strike conviction and three prior felony convictions. (*Id.*, §§ 667,

¹ At trial, Coombs testified he was “a thousand percent sure” of his identification.

subds. (b)–(i), 1203, subd. (e)(4).) On July 1, 2016, a jury found Salazar guilty. During a bifurcated proceeding, appellant’s prior convictions were found to be true.

At sentencing on September 23, 2016, the trial court granted Salazar’s request to strike his prior strike conviction in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and then sentenced him to the upper term of five years in state prison. In granting the *Romero* motion, the court specifically referenced Salazar’s work as a firefighter; the fact he had been out of prison for nine years; and the circumstances of the crime, which did not involve actual threats, a weapon, or any injury to the victim. Immediately thereafter, however, the trial court sentenced defendant to the upper term, noting that aggravating factors outweighed mitigating factors, of which there were none. In particular, the court found in aggravation that Salazar had engaged in violent conduct, sustained numerous prior convictions, served prior prison terms, was on probation at the time of the offense, and had an unsatisfactory performance while on parole. This timely appeal followed.

II. DISCUSSION

As stated above, Salazar argues before this court that the trial court erred in imposing the upper term of five years at his sentencing hearing without properly considering numerous mitigating factors that warranted imposition of the lower or middle term.² In particular, Salazar emphasizes that the trial court explicitly found there were *no* factors in mitigation, despite the fact counsel had expressly argued a number of mitigating factors, and other mitigating circumstances appeared in the record. For instance, at the sentencing hearing in this matter, defense counsel argued that Salazar was a skilled firefighter who had availed himself of every educational opportunity while in custody pending trial. Moreover, in Salazar’s *Romero* motion filed in advance of the sentencing hearing, defense counsel additionally stressed that the robbery at issue was

² A trial court’s sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847–848.) A single factor in aggravation is sufficient to justify the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728, 730; *People v. Weber* (2013) 217 Cal.App.4th 1041, 1064.)

accomplished without threats or use of a weapon; that Salazar’s prior strike conviction was 21 years old; and that he had remained out of prison for nine years. And, in addition, the probation report submitted in this case indicated Salazar reported he was born with fetal alcohol syndrome; stated he had been previously diagnosed with post-traumatic stress disorder due to his time spent in prison; and disclosed he had been using methamphetamine daily since November 2014, a drug which he had first abused at the age of 14. According to Salazar, since the trial court failed to consider all of these mitigating factors when sentencing him to an aggravated term, his sentence should be vacated and the case remanded for resentencing.

Salazar, however, cannot argue on appeal that the trial court failed to properly consider mitigating circumstances when imposing his sentence, because he failed to object on this basis in the trial court. “[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. Steele* (2000) 83 Cal.App.4th 212, 226.) “Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*Scott*, at p. 353.) Thus—as an example particularly relevant to the case at hand—the defendant in *People v. Jones* (2009) 178 Cal.App.4th 853 argued the trial court imposed aggravated terms at sentencing “without considering a number of mitigating factors that were available in the court’s records, such as his addiction to drugs and his history of severe mental disorder.” (*Id.* at p. 859.) The appellate court refused to reach the merits of the defendant’s claim because he had not objected on that basis at the time of sentencing. (*Ibid.*) Here, Salazar is unable to proceed on his similar claim of error, because he failed to assert before the trial court the argument he now raises.

Predictably, Salazar additionally argues that, should we find his claim of sentencing error forfeited, his trial counsel must be deemed ineffective for having failed to object on that basis in the trial court. Our review of counsel’s performance in this

context, however, “must be highly deferential.” (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) To establish ineffective assistance of counsel, the burden is on Salazar to establish both that counsel’s representation fell below prevailing professional norms and that, in the absence of counsel’s failings, a more favorable result was reasonably probable. (*People v. Mickel* (2016) 2 Cal.5th 181, 198; see *Strickland*, at pp. 694, 697.) Moreover, as is relevant here, this burden is particularly “ ‘difficult to carry on direct appeal,’ ” because, under such circumstances, we will reverse only “if there is affirmative evidence that counsel had ‘ ‘ ‘no rational tactical purpose’ ’ ’ for an action or omission.” (*Mickel*, at p. 198; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007–1008; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [“ ‘If the record sheds no light on why counsel acted or failed to act in the manner challenged, “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” [citation], the contention [that counsel provided ineffective assistance] must be rejected’ ”].)

Here, of course, there are any number of reasonable tactical explanations as to why Salazar’s trial counsel might have failed to object to the trial court’s apparent disregard of the potentially mitigating evidence presented in this case. For instance, defense counsel may have reasonably understood the trial court’s statement there were “no mitigating factors” to mean simply that none of the mitigating factors enumerated by rule 4.423 were applicable on this record, as the probation report states. We recognize the mitigating circumstances listed in rule 4.423 are illustrative, not exclusive. Thus, other factors in potential mitigation related to the crime or the defendant may certainly be argued to, and relied upon by, the trial court. (*People v. Jordan* (1986) 42 Cal.3d 308, 316–317; *People v. Johnson* (1979) 95 Cal.App.3d 352, 356–357.) However, it can hardly be deemed unreasonable trial strategy for a defendant to stress some of those factors instead of reiterating all of them in comments to the court at sentencing, as defense counsel did in this case.

Finally, and most obviously, it is clear the trial court was aware of all the potential mitigating circumstances now identified by Salazar on appeal and simply discounted

them, as it was entitled to do. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813 [“A trial court may minimize or even entirely disregard mitigating factors without stating its reasons”].) For instance, as mentioned above, several of the factors Salazar advances on appeal were contained in the probation report, which the trial court expressly indicated it had read and considered. When the trial court indicates it has reviewed and considered documents addressing factors in mitigation, the court is deemed to have considered those factors, even if it does not otherwise refer to the factors in explaining its sentencing decision. (See *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1317–1318, disapproved on another ground as stated in *People v. Cook* (2015) 60 Cal.4th 922, 934–935.) Other possible mitigating evidence, as we have discussed, was highlighted by defense counsel, herself, at the sentencing hearing. And all of the remaining factors in mitigation Salazar identifies on appeal were contained in his *Romero* motion, which the trial court clearly considered. Indeed, as described above, immediately prior to imposing sentence, the trial court cited several of these factors as its rationale for dismissing Salazar’s prior strike conviction. Under such circumstances, any further objection by defense counsel to the trial court’s consideration of potential factors in mitigation would have been futile. Counsel was not ineffective for declining to make such an empty gesture. (*People v. Weston* (1981) 114 Cal.App.3d 764, 780 [“Counsel is not required to make futile objections or motions merely to create a record impregnable to assault for claimed inadequacy of counsel”].)

III. DISPOSITION

The judgment is affirmed.

Reardon, J.*

We concur:

Streeter, Acting P.J.

Tucher, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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